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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**
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8 UNITED STATES OF AMERICA,)
9 vs.) Plaintiff,)
10 HAGOB PALIKYAN,)
11 ARMAN PALIKYAN,)
12 GARY AMBARTSUMYAN,)
13 Defendants.)
14

Case No. 2:08-cr-00311-RLH-GWF

**ORDER VACATING EVIDENTIARY
HEARING AND
FINDINGS & RECOMMENDATION**

**Joint Motion to Dismiss All Counts
(#75) and Joinders (#80, #88)**

15 This matter is before the Court on Defendants Hagob Palikyan and Arman Palikyan's Joint
16 Motion to Dismiss All Counts For Investigative Misconduct Resulting in a Due Process Violation
17 (#75), filed on May 6, 2009. Co-Defendant Gary Ambartsumyan's Joinder (#80) in the Palikyan
18 Defendants' Motion to Dismiss was filed on May 13, 2009. The Government's Opposition to
19 Defendants' Joint Motion to Dismiss All Counts For Investigative Misconduct and Motion to Vacate
20 Evidentiary Hearing (#83) was filed on May 15, 2009. Defendants Hagob Palikyan and Arman
21 Palikyan's Joint Reply to Opposition to Motion to Dismiss (#86) was filed on May 21, 2009. Co-
22 Defendant Gary Ambartsumyan's Joinder (#88) in the Palikyan Defendants' Joint Reply was filed on
23 May 21, 2009.

24 Defendants allege that their Fifth Amendment rights to due process of law were violated
25 because the Government or the law enforcement agents who investigated their alleged crimes
26 purposefully delayed filing charges so that additional crimes, victims and losses would occur and
27 Defendants would be subject to increased sentences under the United States Sentencing Guidelines.
28 The Court entered a minute order (#79) on May 12, 2009 scheduling an evidentiary hearing in this

1 matter for August 3, 2009 at 9:30 A.M. Based on parties' written briefs, however, the Court concludes
 2 that an evidentiary hearing in this matter is not required and that Defendants' Joint Motion to Dismiss
 3 All Counts For Investigative Misconduct Resulting in a Due Process Violation (#75) should be denied.

4 **FACTUAL BACKGROUND**

5 Defendants Hagob Palikyan, Arman Palikyan and Gary Ambartsumyan were initially indicted in
 6 this case on November 18, 2008. The Indictment (#1) charged Defendants with Conspiracy in violation
 7 of 18 U.S.C. § 371; Trafficking in, Production of, and Use of Counterfeit Access Devices in violation
 8 of 18 U.S.C. § 1029(a)(1); Fraudulent Transactions With Access Devices Issued to Other Persons in
 9 violation of 18 U.S.C. § 1029(a)(5), (b)(1); Aggravated Identity Theft in violation of 18 U.S.C. §
 10 1028A(a)(1); and Aiding and Abetting in violation of 18 U.S.C. § 2. A Superceding Indictment (#37)
 11 was filed on January 6, 2009 which added Artur Ambartsumyan as a Defendant and alleged additional
 12 overt acts by Artur Ambartsumyan on November 21, 2008 and by Artur Ambartsumyan and Arman
 13 Palikyan on November 24, 2008. *Superceding Indictment* (#37), ¶¶ 14-15.

14 The indictments allege that the first overt criminal act committed by Defendant Arman Palikyan
 15 occurred on March 3, 2008. On that date, Arman Palikyan allegedly used a Visa debit card account in
 16 the name of another person and the corresponding PIN to fraudulently obtain approximately \$1,000
 17 from a Wells Fargo Bank on Cheyenne Avenue in Las Vegas, Nevada. *Superceding Indictment* (#37),
 18 ¶7. The first alleged overt criminal act committed by Defendant Hagob Palikyan occurred on March 4,
 19 2008 when he allegedly used a Visa debit card account in the name of another person and the
 20 corresponding PIN to fraudulently obtain approximately \$300 from a Wells Fargo Bank located at
 21 Rainbow and Sahara Avenues in Las Vegas, Nevada. *Superceding Indictment* (#37), ¶8. The first
 22 alleged overt criminal act committed by Defendant Gary Ambartsumyan occurred on August 16, 2008
 23 when he allegedly used and attempted to use Bank of America Visa debit card accounts in the name of
 24 other persons and the corresponding PIN numbers to fraudulently obtain money orders in the total
 25 amount of \$13,872 at the Wal-Mart Neighborhood Market on West Charleston Boulevard in Las Vegas,
 26 Nevada. *Superceding Indictment* (#37), ¶12.

27 Defendants' Joint Motion (#75) states that beginning in July 2008, investigators engaged in
 28 surveillance of Defendants as they allegedly used access devices to obtain currency/cash advances or

1 attempted to utilize access devices. The Defendants state that Las Vegas Metropolitan Police
2 Department reports reflect that from July 1, 2008, through December 8, 2008, the LVMPD Criminal
3 Intelligence Section conducted extensive investigation involving various Wal-Mart Neighborhood
4 Markets and Wal-Mart Stores in the Las Vegas area. According to Defendants, the details of the
5 investigation began on July 1, 2008 when Defendant Arman Palikyan attempted to use a debit card at an
6 ATM machine located at the Wal-Mart Store located at 6310 W. Charleston in Las Vegas. The
7 transaction appeared to be declined and Arman Palikyan walked away. Defendants further state that on
8 July 14, 2008, the Wal-Mart Market Asset Protection Manager provided the detective with receipts
9 from the transaction at issue and video evidence from the ATM machine. The receipt allegedly
10 demonstrated that Arman Palikyan attempted to obtain \$1,961.84. *See Joint Motion (#75), p. 3.*
11 Defendants' motion states that the first recorded transaction relating to Defendant Hagob Palikyan
12 occurred on October 8, 2008 in the amount of \$1,000.92. *Id.*, p. 4. However, neither the original nor
13 superceding indictments refer to this alleged transaction.

DISCUSSION

15 In *United States v. Marion*, 404 U.S. 307, 323, 92 S.Ct. 455, 465 (1971), the Supreme Court
16 stated that the applicable statute of limitations is the primary guarantee against bringing overly stale
17 criminal charges. The Court stated that the Due Process Clause of the Fifth Amendment would also
18 require dismissal of the indictment if it were shown at trial that the pre-indictment delay caused
19 substantial prejudice to the defendant's right to a fair trial and the delay was an intentional device to
20 gain a tactical advantage over the accused. *Marion*, 404 U.S. at 324, 92 S.Ct. at 465. The Court stated,
21 however, that “[a]ctual prejudice to the defense of a criminal case may result from the shortest and most
22 necessary delay; and no one suggests that every delay-caused detriment to a defendant should abort a
23 criminal prosecution.” *Id.*

24 The Ninth Circuit applies a two-part test to determine whether pre-indictment delay denied due
25 process: (1) The defendant must prove actual, non-speculative prejudice from the delay and (2) the
26 length of the delay, when balanced against the reason for the delay, must offend those “fundamental
27 conceptions of justice which lie at the base of our civil and political institutions.”” *United States v.*
28 *Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992). A court does not reach the second part of the test unless

1 the defendant proves actual prejudice. *Id.* The defendant has a heavy burden to demonstrate prejudice
 2 which is rarely met. The proof of prejudice must be definite and not speculative. *United States v.*
 3 *Corona-Verbera*, 509 F.3d 1105, 1112 (9th Cir. 2007); *United States v. Martinez*, 77 F.3d 332, 335 (9th
 4 Cir. 1996); *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985). It is also defendant's burden to
 5 prove that dismissal is justified under the second prong of the test. *United States v. Corona-Verbera*,
 6 509 F.3d at 1112; *United States v. Doe*, 149 F.3d 945, 948 (9th Cir. 1998); *United States v. Valentine*,
 7 783 F.2d 1413, 1416-17 (9th Cir. 1986).

8 In this case, the Defendants do not allege that their ability to defend against the indictment has
 9 actually been prejudiced by the loss of witnesses or other evidence. Rather, Defendants contend that
 10 they have been prejudiced because the law enforcement agents delayed the filing of charges until the
 11 Defendants and/or their co-conspirators committed additional crimes that will enhance the Defendants'
 12 sentences if they are convicted. This type of alleged prejudice has not generally been found sufficient
 13 to justify dismissal of the indictment, although it may provide a basis for a downward departure at time
 14 of sentencing.

15 In *United States v. Marion*, 404 U.S. at 325 n. 18, 92 S.Ct. at 466 n. 18, the Court, quoting
 16 *Hoffa v. United States*, 385 U.S. 293, 310 (1966), noted:

17 “There is no constitutional right to be arrested. The police are not
 18 required to guess at their peril the precise moment at which they have
 19 probable cause to arrest a suspect, risking a violation of the Fourth
 20 Amendment if they act too soon, and a violation of Sixth Amendment if
 21 they wait too long.¹ Law enforcement officers are under no constitutional
 22 duty to call a halt to a criminal investigation the moment they have the
 23 minimum evidence to establish probable cause, a quantum of evidence
 24 which may fall far short of the amount necessary to support a criminal
 25 conviction.”

26 In *United States v. Lovasco*, 431 U.S. 783, 791-92, 97 S.Ct. 2044, 2049-50 (1977), the Court
 27 also stated “that prosecutors are under no duty to file charges as soon as probable cause exists but
 28 before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.”
 The Court stated that such a rule would have deleterious effects upon both accused persons and the
 prosecution. It would harm accused persons because of the increased likelihood of unwarranted charges

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 30 ¹*Marion* held that the Sixth Amendment does not apply to pre-indictment or pre-arrest delay.

1 being filed. Conversely, it would make obtaining proof of guilt beyond a reasonable doubt impossible
 2 by causing potentially fruitful sources of information to be evaporated before they can be fully
 3 exploited. The Court further stated:

4 First, compelling a prosecutor to file public charges as soon as the
 5 requisite proof has been developed against one participant on one charge
 6 would cause numerous problems in those cases in which a criminal
 7 transaction involves more than one person or more than one illegal act.
 8 In some instances, an immediate arrest or indictment would impair the
 9 prosecutor's ability to continue his investigation, thereby preventing
 society from bringing lawbreakers to justice. In other cases, the
 prosecutor would be able to obtain additional indictments despite an early
 prosecution, but the necessary result would be multiple trials involving a
 single set of facts. Such trials place needless burdens on defendants, law
 enforcement officials and courts.

10 *Lovasco*, 431 U.S. at 792-93, 97 S.Ct. at 2050.

11 In holding that the Due Process Clause did not impose such a requirement, the Court stated:

12 [I]nvestigative delay is fundamentally unlike delay undertaken by the
 13 Government solely "to gain tactical advantage over the accused," *United*
 14 *States v. Marion*, 404 U.S. at 324, precisely because investigative delay is
 not so one-sided. Rather than deviating from elementary standards of
 "fair play and decency," a prosecutor abides by them if he refuses to seek
 indictments until he is completely satisfied that he should prosecute and
 will be able promptly to establish guilt beyond a reasonable doubt.
 Penalizing prosecutors who defer action for these reasons would
 subordinate the goal of "orderly expedition" to that of "mere speed."
Smith v. United States, 360 U.S. 1, 10 (1959). This the Due Process
 Clause does not require. We therefore hold that to prosecute a defendant
 following investigative delay does not deprive him of due process, even if
 his defense might by somewhat prejudiced by the lapse of time.

19 *Id.*, 431 U.S. at 795-96, 97 S.Ct. at 2051-52.

20 In *United States v. Baker*, 63 F.3d 1478, 1500 (9th Cir. 1995), the defendant contended that the
 21 government unnecessarily prolonged its investigation of a contraband cigarette trafficking scheme for
 22 the sole purpose of increasing the coconspirators' sentencing exposure. The defendant argued that this
 23 sentencing manipulation violated due process and barred the prosecution. In affirming the denial of the
 24 motion to dismiss, the Ninth Circuit stated that "[t]he viability of sentencing manipulation as a valid
 25 doctrine is uncertain. No court has held, however, that sentencing manipulation can serve as a complete
 26 bar to prosecution." The court noted that sentencing "entrapment" may be a proper basis for a
 27 downward departure at sentencing. *Id.*, citing *United States v. Staufer*, 38 F.3d 1103, 1106 (9th Cir.
 28 1994). Sentencing entrapment occurs when a defendant who is disposed to commit a minor or lesser

1 offense is entrapped into committing a greater offense, subject to greater punishment. *Id.* The court
 2 then stated:

3 Baker does not contend he was subjected to this form of “sentencing
 4 entrapment.” He asserts only that the government stretched out its
 5 investigation after it had sufficient evidence to indict. This may be true,
 6 but we decline to adopt a rule that, in effect, would find “sentencing
 manipulation” whenever the government, even though it has enough
 evidence to indict, opts instead to wait in favor of continuing its
 investigation. *See Jones*, 18 F.3d at 1155.

7 Such a rule “would unnecessarily and unfairly restrict the discretion and
 8 judgment of investigators and prosecutors.” *Id.* at 1145. “Police . . . must
 9 be given leeway to probe the depth and extent of a criminal enterprise, to
 10 determine whether coconspirators exist, and to trace . . . deeper into the
 11 distribution hierarchy.” *United States v. Calva*, 979 F.2d 119, 123 (8th
 12 Cir. 1992). *See also United States v. Shepard*, 4 F.3d 647, 649 (8th Cir.
 13 1993), *cert. denied*, 510 U.S. 1203, 127 L.Ed. 671, 114 S.Ct. 1322
 14 (1994). Moreover, since the government bears the burden of proving its
 case beyond a reasonable doubt, it must be permitted to exercise its own
 judgment in determining at what point in an investigation enough
 evidence has been obtained. We reject Baker’s sentencing manipulation
 argument.

15 *Baker*, 63 F.3d at 1500.

16 In *United States v. Lopeztegui*, 230 F.3d 1000, 1003 (7th Cir. 2000), the Seventh Circuit construed
 17 *Baker* as rejecting “sentencing manipulation” as grounds for finding a due process violation based on
 18 pre-indictment delay. In an earlier case, *United States v. Spears*, 159 F.3d 1081, 1086 (7th Cir. 1998),
 19 the Seventh Circuit stated that the government is not obligated to save the defendant from himself and
 20 that any prejudice the defendant suffered because of pre-indictment delay was the result of his own
 21 criminal conduct, and not from any government misconduct. *Spears* also involved circumstances which
 22 arguably suggested that the prosecutor vindictively charged the defendant, several years after the
 23 alleged crime occurred, because of his acquittal on an intervening and more serious state criminal
 24 charge. Defendants have not pointed to any similar circumstances here.

25 In *United States v. Martinez*, 77 F.3d 332, 336 (9th Cir. 1996), the defendant was indicted
 26 approximately six months after he committed the crime of possession of stolen property. The defendant
 27 pled guilty and was sentenced to eight months in prison. Shortly before defendant completed his
 28 sentence, he was indicted for conspiracy involving possession or sale of stolen property in other
 incidents that were known to law enforcement officers at the time defendant was charged and pled

1 guilty to the first possession offence. The government explained that the delay in charging defendant
2 with the other crimes was due to backlog in the prosecutors' offices. In reversing the dismissal of the
3 later indictment based on pre-indictment delay, the court held that defendant had not met his heavy
4 burden to show actual, non-speculative prejudice. The court held that defendant's claim of prejudice
5 was speculative because the sentencing guidelines provided the district judge with leeway to grant
6 downward departures in the sentence that might otherwise be imposed as a result of the delay that
7 occurred.

8 In this case, the first crimes allegedly committed by Defendants Arman and Hagob Palikyan
9 occurred on March 3 and 4, 2008. The indictment was filed eight and a half months later on November
10 18, 2008. According to the sketchy information provided in Defendants' motion to dismiss, law
11 enforcement officers began investigating defendants on July 1, 2008. Under Defendants' scenario, the
12 period of alleged "pre-indictment delay" was approximately four and a half months as to Arman
13 Palikyan and was much shorter as to Defendants Hagob Palikyan and Gary Ambartsumyan. These
14 alleged periods of delay do not, on their face, suggest that the Government engaged in improper delay to
15 obtain a tactical advantage over the Defendants.

16 Even assuming that the Government had sufficient evidence to commence the prosecution
17 against Defendants Arman and Hagob Palikyan shortly after the initial crimes were committed on
18 March 3-4, 2008, Defendants have failed to allege any factual basis for concluding that the Government
19 delayed bringing charges in order to obtain an unfair tactical advantage. Count One of the Superceding
20 Indictment (#37) charges the Defendants with conspiracy involving the trafficking in, production and
21 distribution of counterfeit access devices, fraudulent transactions with access devices and aggravated
22 identity theft. As *Lovasco and Baker* indicate, law enforcement must be given leeway to probe the
23 depth and extent of a criminal enterprise, to determine whether coconspirators exist, and to trace deeper
24 into the alleged conspiracy's hierarchy. A period of eight and a half months between the commission of
25 the first crime and the filing of the indictment charging several individuals with conspiracy involving
26 counterfeit access devices and identity theft does not, on its face, suggest improper pre-indictment delay
27 by the Government. That the alleged conspirators may commit additional crimes while the Government
28 pursues its investigation into the alleged conspiracy does not constitute government conduct that

1 offends those ““fundamental conceptions of justice which lie at the base of our civil and political
 2 institutions.”” *United States v. Huntley*, 976 F.2d at 1290.

3 **CONCLUSION**

4 In *United States v. Voigt*, 89 F.3d 1050, 1067 (3rd Cir. 1996), the Third Circuit stated that a
 5 defendant's moving papers must demonstrate a colorable claim for relief in order to justify an
 6 evidentiary hearing based on outrageous government conduct in violation of the Fifth Amendment. In
 7 order to be colorable, a defendant's motion must consist of more than mere bald-faced allegations of
 8 misconduct. Defendant must allege specific facts supporting his claim of government misconduct. In
 9 *United States v. Lazarevich*, 147 F.3d 1061, 1065 (9th Cir. 1998), the Ninth Circuit stated that an
 10 evidentiary hearing is not required where the evidence is in equipoise such that defendant cannot meet
 11 his high burden to support dismissal of the indictment. Here, the Defendants have, at most, shown that
 12 additional crimes occurred while the Government was investigating an alleged ongoing criminal
 13 conspiracy. Such allegations do not justify an evidentiary hearing based on outrageous government
 14 conduct in violation of the Due Process Clause. Accordingly,

15 **IT IS HEREBY ORDERED** that Co-Defendant Gary Ambartsumyan's Joinder (#80) in the
 16 Palikyan Defendants' Motion to Dismiss and his Joinder (#88) in the Palikyan Defendants' Joint Reply
 17 are **granted**.

18 **IT IS FURTHER ORDERED** that the evidentiary hearing on Defendants' Motion to Dismiss
 19 (#75) scheduled for August 3, 2009 at 9:30 A.M. is **vacated**.

20 **RECOMMENDATION**

21 **IT IS HEREBY RECOMMENDED** that Defendants' Joint Motion to Dismiss All Counts For
 22 Investigative Misconduct Resulting in a Due Process Violation (#75) be **denied**.

23 **NOTICE**

24 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in
 25 writing and filed with the Clerk of the Court within ten (10) days. The Supreme Court has held that the
 26 courts of appeal may determine that an appeal has been waived due to the failure to file objections
 27 within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1)
 28 failure to file objections within the specified time and (2) failure to properly address and brief the

objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

DATED this 2nd day of June, 2009.

George Foley Jr.
GEORGE FOLEY, JR.
United States Magistrate Judge